Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ENRIQUE RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, following petitioner's jury waiver, the government's direct verbal notice and presentment to the trial judge of a sentencing enhancement per 21 U.S.C. § 851 is prejudicial error where the notification is in direct violation of Rule 49(e), Fed.R.Crim.Proc.?

2. Whether the decision of the Fifth Circuit may remain viable where the First, Seventh, Eighth, Ninth and Tenth Circuits have ruled that § 851 sentencing enhancements lack impact following the enactment of the Federal Sentencing Guidelines?

CERTIFICATE OF INTEREST

The Petitioner, ENRIQUE RODRIGUEZ, is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois, 60614.

Neither party has any other interest nor represents any other party or interest in these proceedings.

Allan A. Ackerman

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
CERTIFICATE OF INTEREST	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
RULE AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	12
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF AUTHORITIES

Cases	PAGE
Gregg v. United States, 394 U.S. 489 (1969) ...	10, 11
Suveges v. United States, 7 F.3d 6 (1st Cir. 1995) .	8, 9
United States v. Day, 969 F.2d 39 (3rd Cir. 1992) .	9
United States v. Koller, 956 F.2d 1408 (7th Cir. 1992)	9
United States v. McDougherty, 920 F.2d 569 (9th Cir. 1990) *cert. denied*, 499 U.S. 911, 111 S.Ct. 1119 (1991)	9
United States v. Parks, 521 F.2d 1381 (9th Cir. 1975)	11
United States v. Wallace, 895 F.2d 487 (8th Cir. 1990)	8, 9
United States v. Whitaker, 938 F.2d 1551 (2nd Cir. 1991) *cert. denied*, 112 S.Ct. 977 (1992)	9
Young v. United States, 936 F.2d 553 (11th Cir. 1991)	9

Statutes and Rules	
21 U.S.C. § 846	3, 4
21 U.S.C. § 851	3, 7, 9, 10, 11
28 U.S.C. § 1254(1)	2
Rule 32, Fed.R.Crim.Proc.	10
Rule 49, Fed.R.Crim.Proc.	2, 3, 11
Rule 49, Fed.R.Crim.Proc., September 1995 Supplement and Notes of Advisory Committee On Rules	7
Rule 201, Federal Rules of Evidence	11

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Enrique Rodriguez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 19, 1995.

OPINION BELOW

The decision of the court of appeals (App. A, *infra*) will not be reported in the Federal Reporter. The panel affirmation of petitioner's conviction and sentence is unpublished.

JURISDICTION

The unpublished affirming decision and judgment of the court of appeals was entered on September 19, 1995 (App. A, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULE AND STATUTE INVOLVED

Rule 49 of the Federal Rules of Criminal Procedure states:

> **Rule 49. Service and Filing of Papers**
>
> **(a) Service: When Required.** Written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers shall be served upon each of the parties.
>
> **(b) Service: How Made.** Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.
>
> **(c) Notice of Orders.** Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.
>
> **(d) Filing.** Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

> **(e) Filing of Dangerous Offender Notice.** *A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate judge in the district, except that in a district having a single judge and no United States magistrate judge, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.* (Petitioner's emphasis)
>
> (As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1067, eff. July 1, 1968; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

21 U.S.C. § 851 is a sentencing enhancement provision, predating the Federal Sentencing Guidelines, concerning previous drug violations (21 U.S.C. § 851 is reproduced as App. B). Both 21 U.S.C. §§ 849 and 851 are the subject of past and current repeal.

STATEMENT OF THE CASE

After a bench trial in the United States District Court, Houston, Texas, petitioner was convicted on one count of federal cocaine conspiracy in violation of 21 U.S.C. § 846. He was sentenced to 24.33 years in federal custody, to be followed by ten years' supervised release (R. 92). He was also fined $25,000.00. A panel of the Court of Appeals affirmed petitioner's conviction (App. A, *infra*).

1. On June 29, 1994 petitioner and others were charged by a federal grand jury in Houston, Texas with

conspiring to distribute cocaine in violation of 21 U.S.C. § 846. On October 3, 1994 petitioner and his co-defendants appeared before the Honorable Ewing Werlein, Jr. for trial in the U.S. District Court, Houston, Texas. The co-defendants entered guilty pleas. Petitioner, along with counsel for the government and the court agreed that petitioner would be tried by the court.

2. After petitioner's jury waiver was accepted by the court, but prior to opening statements, the following colloquy appears of record:

> MR. PEREZ (AUSA): May I be heard, your Honor?
>
> THE COURT: Yes, Mr. Perez.
>
> MR. PEREZ: I just wanted the record to be clear, your Honor, the government has filed a *notice of intent to enhance sentence in United States of America versus Enrique Rodriguez, Criminal H-94-143*. I wanted to make that clear that that's been done prior to commencing here today, your Honor.
>
> THE COURT: If that's been filed, I don't see it before me.
>
> THE CLERK: I have it, Judge.
>
> THE COURT: Yes, the clerk has it.
>
> MR. ACKERMAN (Def. Atty): If the court please, I would ask the court to wait just one moment, I wanted to check—
>
> THE COURT: Yes. Very well, Sir.
>
> MR. ACKERMAN: Your Honor, at this point in time I would have to ask for a mistrial. I don't believe it's appropriate for the government to bring to the attention of the trial court the ministerial or administrative act of filing the motion for the enhanced penalty with the clerk of the court. That may carry with it some inherent prejudice which the defendant should

not suffer from at this point in time. I liken it very much to that which was repealed some years ago, which was the notice the government would file with the clerk of the court with enhanced penalties under certain organized crimes sections of the now repealed portion of Title 18, the operative fact was it's filed with the clerk of the court, not with the judge, nor is the judge notified unless and until there's a conviction in the case. The government, now having brought it to the court's attention, I would accordingly move for a mistrial.

THE COURT: All Right. Mr. Perez.

MR. PEREZ: Your Honor, I filed it with the clerk of the court and I just wanted the record to be clear that I filed it with the clerk prior to commencing trial here today, your Honor.

THE COURT: All right. The motion is overruled.

All right. And, further, the statement that was made simply was calling attention to its having been filed, I asked, I remarked that I had not seen it. The clerk found it for me. There was no objection from the defense at that time when I examined it.

All right. Let's proceed, then. Is the plaintiff ready to go, government ready to go forward?

MR. PEREZ: Yes, Your Honor.

THE COURT: Is the defendant ready?

MR. ACKERMAN: Yes, your Honor. (Tr. 9-12, 10/3/94 at 2:30 p.m.)

3. After petitioner's motion for a mistrial was denied, the government presented evidence showing that petitioner met with a co-defendant in Chicago, Illinois on June 1, 1994. The co-defendant had spent from approximately May 27 to June 1 arranging a cocaine delivery in Houston. Petitioner was not involved in any negotiations

and was not present in Houston. However, petitioner's co-defendant had arranged to deliver monies to an undercover informant in a Chicago suburb during the evening of June 1, 1994. Petitioner accompanied one of his co-defendants on this delivery; both were arrested after the monies were turned over.

The government stipulated that there were no identifiable fingerprints on either the monies or on the bag used to carry it; still, the prosecution alleged that petitioner had conspiratorial complicity. The district court also admitted a Department of Justice notification regarding the monies belonged to a co-defendant, not the petitioner (Vol. II, at Tr. 200-02; Ex. to R. 48).

On October 4, 1994 petitioner was found guilty. On December 16, 1994 petitioner, sixty-years of age, was sentenced to 24.33 years in federal custody (R. 92). The 24-year sentence is the functional equivalent of life-in-prison.

4. A panel of the Court of Appeals for the Fifth Circuit affirmed petitioner's conviction and sentence finding, *inter alia*, that Rule 49(e), if applicable, was harmless. The appeals court declined to decide the applicability of Rule 49(e) (App. 8(a)-10(a) and unnumbered footnote).

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's holding that Rule 49(e) lacked applicability is in complete contradiction to the rule. The advisory committee notes in connection with Rule 49 and the 1985 amendments include the following:

1985 AMENDMENT

18 U.S.C. § 375(a) and 21 U.S.C. § 849(a), dealing respectively with dangerous special offender sentencing and dangerous special drug offender sentencing, provide for the prosecutor to file notice of such status "with the court" and for the court to "order the notice sealed" under specified circumstances, *but also declare that disclosure of this notice shall not be made "to the presiding judge without the consent of the parties" before verdict or plea of guilty or nolo contendere.* (Petitioner's emphasis)[1]

Rule 49(e) prohibits the disclosure of the prior conviction where the purpose of the disclosure may serve to prejudice the defendant. The notice impacts only upon potential sentence enhancement in the event of a conviction. Further, the circuits have settled the issue on the applicability of 21 U.S.C. § 851 and its confluence with the Federal Sentencing Guidelines. At base, § 851 lacks application where the Federal Sentencing Guidelines regulate sentencing.

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[1] The September 1995 supplement to the Federal Code and Rules (West Supp. 1995) states:

RULE 49. Service and Filing of Papers

[See main pamphlet for text of (a) to (d)]

[(e) **Filing of Dangerous Offender Notice.**] (Abrogated April 27, 1995, eff. December 1, 1995, absente contrary Congressional action.)

NOTES OF ADVISORY COMMITTEE ON RULES
1995 AMENDMENT

Subdivision (e) has been deleted because both of the statutory provisions cited in the rule have been abrogated.

The above anticipated abrogation serves to support petitioner's position that the § 851 filing at bar was a nullity in light of the Federal Sentencing Guidelines.

2. The Federal Sentencing Guidelines, in effect at the time of trial (October 1994), dictate the sentence imposed in the event of a drug conviction involving twenty or more kilograms of cocaine. The USSG guideline called for a level 38 on conviction. The criminal history component, if any, thereafter serves to enhance the sentence beyond the 235-293 USSG sentence (1994 table). In *United States v. Wallace*, 895 F.2d 487, 490 (8th Cir. 1990), the court affirmed a lengthy drug related sentence where the complaints on appeal included the failure to file notice of enhancement pursuant to 21 U.S.C. § 851. The court rejected *Wallace's* plaints, noting:

> As previously indicated, Wallace was sentenced pursuant to **the sentencing guidelines which became effective after section 851(a)(1) was passed. There is nothing in the guidelines that provides that an information must be filed in order to rely upon prior offenses.** Section 851(a)(1), therefore, is limited to situations in which a convicted defendant's statutory minimum or maximum penalty is enhanced under Part D of Title 21, and not to situations in which the defendant is assigned a guidelines base offense level and receives an increased sentence, which is within a statutory range.

895 F.2d 490 (emphasis added).

In *Suveges v. United States*, 7 F.3d 6 (1st Cir. 1995), the court affirmed the denial of relief where the petitioner sought sentence vacation on § 2255, alleging a material flaw in the § 851 enhancement sentencing scheme. The court rejected the notion that § 851 had application, noting that almost every circuit considering the question found that "*. . . the guidelines do not require the filing of an informational notice when using prior convictions for sentence-enhancement purposes . . .*" (7 F.3d at 9, citing

United States v. Wallace, with approval).[2] The First Circuit cataloged sister circuit opinions, each noting the lack of a § 851 applicability since the advent of the Federal Sentencing Guidelines.[3]

In *United States v. Koller*, 956 F.2d 1408, 1417 (7th Cir. 1992), the court affirmed drug-related convictions and sentences where an appellate plaint related to the interplay between § 851 and the Federal Sentencing Guidelines. While rejecting *Koller's* appellate arguments, the court noted:

> That section [21 U.S.C. § 851] (enacted long before the Guidelines) applies to additional penalties provided by a repeater statute over and above the maximum penalty prescribed by statute for a particular offense. *It has no application to the effect of prior convictions in deciding the appropriate sentence within such maximum pursuant to the Guidelines. Several other circuits have held that § 851 does not apply to enhancements under the Sentencing Guidelines.* (956 F.2d at 1417; sister circuit parallel citations omitted; emphasis added)

Given the above, why would the attorney for the government even file with the Clerk of the Court a notice pursuant to 21 U.S.C. § 851? In the event of conviction,

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[2] In *Suveges*, the court of appeals, while affirming the rejection of the § 851 asseverations, remanded the case back to the district court to consider the legality of an enlarged term of supervised release, 7 F.3d at 10, n. 6.

[3] In accord, *United States v. Day*, 969 F.2d 39, 48 (3rd Cir. 1992); *United States v. Whitaker*, 938 F.2d 1551, 1552 (2nd Cir. 1991); *cert. denied*, 112 S.Ct. 977 (1992); *Young v. United States*, 936 F.2d 553, 536 (11th Cir. 1991); *United States v. McDougherty*, 920 F.2d 569, 574 (9th Cir. 1990); *cert. denied*, 499 U.S. 911, 111 S.Ct. 1119 (1991).

the guidelines speak for themselves and prior convictions, if applicable, are infused into the criminal history mix as an enhancement component.

Petitioner filed a timely post trial motion (R. 73). The government filed a response parroting the statutory language of § 851(a)(1) while denying any intent to influence the court by bringing the filing to its attention (R. 74). Setting to one side the government's self-serving claim, the bottom line is that § 851 lacks application at bar. Further, bringing to the attention of the trier of fact the prior drug conviction carries the functional equivalent of parading the defendant's past conduct in the face of the factfinder. The dominant purpose can only be to ever-so-subtly prejudice the accused in the eyes of the factfinder.

3. Petitioner argues by analogy. Rule 32, Fed.R.Crim. Proc., mandates that a presentence report may not be considered by the trial court prior to an adjudication of guilt. In *Gregg v. United States*, 394 U.S. 489, 491, 89 S.Ct. 1134, 1136 (1969), the Court found that a violation of Rule 32 must be *per se* error mandating conviction vacation. The Court stated:

> Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the *ex parte* introduction of this sort of material to *the judge who will pronounce the defendant's guilt or innocence* or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report. * * * Although the judge may have that information at his disposal in order to give

> a defendant a sentence suited to his particular character and potential for rehabilitation, there is no reason for him to see the document until the *occasion to sentence arises*, and under the rule he must not do so. (89 S.Ct. at 1136; emphasis added).[4]

What seems the prosecutor's intended violation of this Court's rule should not be the subject of condonation. Further, the prosecutorial conduct unyieldingly led to the trial judge learning that petitioner had a prior drug conviction. Petitioner's trial was to the court. The Court need not speculate whether a Rule 49(e) violation might compel conviction vacation had the government brought petitioner's prior conviction to the attention of the trial judge, but not an empaneled jury. That question is not within the contours of this petition. At bar, in a bench-trial setting, counsel for the government violated the letter and the spirit of the rule.[5]

4. Petitioner asserts that a confluence of facts merit the granting of review and relief. Both the prosecution and the trial judge violated Rule 49, Fed.R.Crim.Proc.

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[4] In *Gregg*, the Court affirmed, finding that it was not clear that the trial judge read the presentence report prior to the return of the jury verdict, 89 S.Ct. at 1137. Following *Gregg*, in *United States v. Parks*, 521 F.2d 1381, 1382-83 (9th Cir. 1975) the court reversed drug convictions following a bench trial, where the trial judge previously read defendant's presentence report.

[5] The advisory committee notes regarding Rule 49(e) (1985 Amendment) consider the impact of an § 851 filing in a federal judicial district where there might be only a single U.S. District Court judge. The committee notes some confusion on that score. However, the Court may judicially note pursuant to FRE 201 that in October 1994 there were ten sitting United States District Court judges in Houston, Texas. Hence, the advisory committee notes do not impact on the case at bar.

Petitioner sought the declaration of a mistrial prior to opening statements. The granting of the motion would have left the parties as they were. Had the timely motion for mistrial been granted, petitioner would have requested that another judge of the court hear the case, with or without a jury.

In light of the Fifth Circuit's aberrant position, this Court's intervention is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed September 19, 1995]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20952
(Summary Calendar)

United States of America,

Plaintiff-Appellee,

versus

Enrique Rodriguez,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-94-0143-2)

Before HIGGINBOTHAM, DUHÉ and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant Enrique Rodriguez was convicted of conspiracy to possess with intent to distribute in excess of five

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A) and 21 U.S.C. § 846. Rodriguez appeals his conviction, alleging that the evidence was insufficient to support the district court's verdict, and that the district court impermissibly relied on inadmissible evidence, rendering the trial fundamentally unfair. Finding no error, we affirm.

I

The Guatemala Office of the Drug Enforcement Administration ("DEA") initiated an investigation after one of their agents was informed by a confidential informant ("CI-1") that he had been approached about transporting cocaine from Guatemala into the United States. Under DEA supervision, CI-1 eventually agreed to assist Victor Suarez (a/k/a Frank Suarez) ("Suarez") and his organization to transport the cocaine. Suarez informed CI-1 that he had approximately 300 kilograms of cocaine in Guatemala and agreed to pay CI-1 $2,000 per kilogram to transport the cocaine to Houston, Texas.

In May, CI-1 traveled to Guatemala City where he received approximately 165 kilograms of cocaine from a Suarez associate identified only as "El Gordo." Later that month, the two CIs flew to Houston where they met with Suarez and two of his associates, Beau Charles Martin and Antonio Borrego-Vidal (a/k/a Jose Rivera Santiago) ("Borrego"). At this meeting, they discussed the delivery of the cocaine to Houston and how the money would be exchanged. They agreed that half of the money would be transferred in Houston once the cocaine was delivered there, and the other half would be handed over in Chicago upon notification that the Houston delivery was completed.

At a meeting the next day, Suarez, Borrego and Martin supplied the CIs with a pager number that could be used to contact the drivers of the vehicles to be used to transfer the cocaine in Houston. Telephone toll records reflect that a couple of days later, two calls were made from Rodriguez's home telephone to this contact number. The records also reflect that during the months preceding the final June 1st delivery in Houston, several telephone calls were made from Rodriguez's home telephone to cellular telephones used by Suarez in Miami, as well as telephone calls made by Suarez to Rodriguez's home and cellular telephone.

In the evening of June 1st, CI-1 met with Borrego and Martin at a Houston shopping center in order to receive half the money and turn over the cocaine hidden in the vehicles supplied by Suarez. CI-1 received over $232,000 in brown paper and marked with either "10KK" or "6K," depending on whether the bundle contained $10,000 or $6,000. The keys to the vehicles where not given to Borrego and Martin until word came from Chicago that another confidential informant ("CI-2") had received the second half of the payment for the cocaine. The telephone records reflect that during this time several telephone calls were placed to Borrego and Martin's pager and cellular telephone from Rodriguez's residence.

Suarez at this time was at Rodriguez's residence in Chicago and attempted to convince CI-2 to pick up the second half of the money at Rodriguez's. CI-2, however, managed to persuade Suarez to deliver the money to CI-2's room at the Marriott Residence Inn in suburban Chicago. Rodriguez eventually came on the phone and took down the directions to the Marriott. The Marriott room was equipped with video and audio equipment for

law enforcement agents to monitor and record the money exchange.

Suarez and Rodriguez arrived at the Marriott room together. When Rodriguez entered the room, he was carrying a brown shoulder bag. Rodriguez opened the bag and, speaking to CI-2 in Spanish, mentioned an amount roughly approximating the amount expected by the undercover agents. The shoulder bag was later found to contain approximately $202,000 in packaged bundles marked "10k." During this time, Suarez was in communication over the phone with the people in Houston and eventually the vehicles containing the cocaine were released. In the hotel room, Rodriguez and Suarez engaged in a conversation with CI-2 in which they repeatedly stated how disgusted they were with how the transaction was going and intimated that they were unsure whether they would be doing business again in the future.

During the events in Chicago, Suarez stayed in a Quality Inn hotel room rented by Rodriguez in his own name for the period May 30 through June 5. When Borrego was arrested in Houston, he was found to be in possession of Rodriguez's business card, on the back of which was written the telephone number of his Chicago residence. Rodriguez's home telephone number was also stored in the memory of the pager seized from Borrego.

A federal grand jury indicted Rodriguez, Suarez, Borrego and Martin for conspiring to possess with the intent to distribute over five kilograms of cocaine and for aiding and abetting in possession with the intent to distribute the cocaine. The Government elected to proceed only on the conspiracy charge. After his codefendants pleaded guilty, Rodriguez waived his right to a jury trial.

The district court found that the Government proved beyond a reasonable doubt that Rodriguez was guilty of conspiring to possess with intent to distribute over five kilograms of cocaine. Rodriguez was sentenced to 292 months imprisonment, 10 years supervised release, a $25,000 fine and the $50 special assessment. Rodriguez challenges his conviction, contending that the evidence was insufficient to support the district court's finding, and that the court impermissibly relied on the notice to enhance his penalty filed by the Government and on his codefendants' guilty pleas.

II

Rodriguez asserts that the evidence was insufficient to support his conviction for conspiracy to possess with intent to distribute cocaine. He does not deny that a conspiracy existed. Instead, Rodriguez argues that the evidence did not establish beyond a reasonable doubt that he was a knowing participant in the conspiracy. In reviewing the ultimate finding of guilt by the district court, we apply a "substantial evidence test." *United States v. Cardenas,* 9 F.3d 1139, 1156 (5th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 2150, 128 L. Ed. 876 (1994). It is not this court's function "to make credibility choices or to pass upon the weight of the evidence. The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty. . . ." *Id.* (internal citations and quotations omitted). In applying this test, we view the evidence in the light most favorable to the government and defer to any reasonable inferences of fact drawn by the district court. *Id.* Moreover, our review under the substantial evidence test makes no distinction between direct and circumstantial evidence. *Id.*

A conviction for conspiracy requires the Government to prove beyond a reasonable doubt: (1) that a conspiracy existed; (2) that Rodriguez knew of the conspiracy; and (3) that Rodriguez voluntarily participated in the conspiracy. *Id.* at 1157; *United States v. Rodriguez-Mireles,* 896 F.2d 890, 892 (5th Cir. 1990). Knowledge and voluntary participation may be inferred from a collection of circumstances. *Cardenas,* 9 F.3d at 1157; *United States v. Espinoza-Seanez,* 862 F.2d 526, 537 (5th Cir. 1988). While "mere presence at the scene of the crime or a close association with a co-conspirator alone cannot establish voluntary participation in a conspiracy," presence and association are both factors which may be relied upon to find that the defendant engaged in conspiratorial activity. *Cardenas,* 9 F.3d at 1157.

There is substantial evidence to support the district court's implicit finding that Rodriguez knowingly and voluntarily participated in the conspiracy. Suarez and Rodriguez were together at Rodriguez's residence when Suarez was negotiating the final money transfer with one of the confidential informants. Carrying the bag containing the money, Rodriguez accompanied Suarez to the Marriott Residence Inn in suburban Chicago where the undercover agents were waiting for them.

Once in the room at the Marriott, Rodriguez made a statement to the confidential informant as to the amount of money in the bag corresponding roughly to the amount expected by the undercover agents. The should[er] bag was found to contain packaged bundles marked "10K"

which together amounted to approximately $202,000.[1] A conversation ensued between Suarez, Rodriguez and the confidential informant during which both Suarez and Rodriguez expressed their displeasure with the way the transaction was going.[2] This conversation and Rodriguez's handling of the money strongly suggests that he knew about the nature of the transaction and that he freely chose to take part in the conspiracy.

While Rodriguez's participation in the money transfer at the Marriott hotel may be the most important piece of evidence establishing his knowledge and voluntary participation in the conspiracy, it is not, as Rodriguez

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[1] Two Drug Enforcement Agents testified that, in their experienced opinion, individuals in the drug trade do not conduct their business around persons who are not trusted. Another agent opined that the main deal makers use trusted associates, who have knowledge of what is happening, to make travel arrangements, carry the drugs and money, and complete other small tasks. *See United States v. Gallo*, 927 F.2d 815, 821 (5th Cir. 1991) (jury could reasonably conclude from evidence that defendant knew he was transporting approximately $300,000 and therefore that he also knew the object of the conspiracy).

[2] According to the testimony of one of the undercover agents present at the Marriott:

> [C]onversation was engaged in by [CI-2] and Mr. Rodriguez about how they were unhappy with the way the deal was going, that it was going drawn out way too long and that this was taking too much time for the transaction to take place in Houston while we were waiting for our money here, and that was just not a good way to do business. At that time, both Mr. Suarez and Rodriguez continued to reiterate their disgust with how the ultimate business transaction was going with the delivery of the cocaine in Houston.

Record on Appeal, vol. 1, at 142-43.

argues, the only evidence supporting his conspiracy conviction. The Quality Inn hotel room where Suarez stayed during his time in Chicago had been rented by Rodriguez and was registered in his name. When Borrego was arrested he was found to be in possession of Rodriguez's home phone number. During the time period in which the transaction was being negotiated, several telephone calls were placed to and from Rodriguez's home and Suarez's cellular telephone. The evidence also reflects that several calls were placed from Rodriguez's residence to the contact numbers provided by the undercover agents. All of this evidence further supports the inference that Rodriguez knew about the cocaine transaction being negotiated.

We conclude that the evidence at trial, when viewed in the light most favorable to the government, is substantial enough to support the district courts finding that Rodriguez knowingly and voluntarily participated in the conspiracy to possess with an intent to distribute cocaine.

III

Rodriguez also presents a somewhat confused argument that the district court impermissibly considered (1) a prior conviction contained in Rodriguez's penalty enhancement notice, and (2) the guilty pleas of his codefendants, and that the combination of these factors denied his right to a fair trial.

While organizing themselves for opening statement, but before beginning his opening statement, the Assistant U.S. Attorney ("AUSA") clarified for the record that the Government had filed a notice of intent, upon Rodriguez's conviction, to seek enhancement of Rodriguez

conviction, as required under 21 U.S.C. § 851.[3] Rodriguez's counsel moved for mistrial, contending that the Government improperly mentioned the filing of this enhanced penalty notice and suggested that it "may carry with it some inherent prejudice which the defendant should not suffer from at this point in time."[4]

Rodriguez also argues, on the basis of a comment made by the district court during opening statements, that the court impermissibly relied upon the factual bases of his

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[3] Section 851 states in relevant part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States Attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon . . . .

21 U.S.C. § 851.

[4] Rodriguez argues on appeal that Rule 49 may establish the error in the Government's action. Rule 49(e) states:

> A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate judge in the district, except that in a district having a single judge and no United States magistrate judge, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

Fed. R. Crim. Proc. 49(e). Because we hold that the error, if any, was harmless, we do not need to decide whether this provision is applicable.

codefendant's guilty pleas to find Rodriguez guilty. As the AUSA began his opening statement, the district court interrupted him and informed him that it was unnecessary to reiterate all of the facts already recited at the arraignment and directed the AUSA instead to focus his attention of the facts as they related specifically to Rodriguez.[5] Finally, Rodriguez argues that the combination of these factors denied him a fundamentally fair trial.

The denial of a motion for mistrial is reviewed for abuse of discretion. *United State v. Coveny,* 995 F.2d 578, 584 (5th Cir. 1993). In moving for a mistrial, Rodriguez raised the propriety of the Government calling the court's attention to the filing of the notice of enhancement and the alleged inherent prejudice from doing so. This court presumes that a judge, sitting as the trier of fact, disregards inadmissible evidence and relies only upon admissible evidence in making the determination of guilt. *Cardenas,* 9 F.3d at 1156. "Any error the judge makes in admitting evidence is thus harmless if there exists other admissible evidence sufficient to support the conviction." *Id.* Thus, even if we assume that there was error here, it was harmless in light of the substantial evidence suffi-

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[5] The district court stated:

> Let me say, Mr. [AUSA], excuse me for interrupting you, if what you are suggesting is you expect to prove the matters that have been generally recited already in the rearraignments that have taken place, then I won't trouble you to reiterate that. I thought that if you wanted to focus upon the evidence that would pertain particularly with respect to this defendant and how that ties in to the conspiracy, then that would be more helpful, I should think.

Record on Appeal, vol. 4, at 13.

cient to support the conviction. Therefore, there was no abuse of discretion.

There is no evidence in the record that the district court in fact considered either the penalty enhancement notice or the codefendant's guilty pleas in finding Rodriguez guilty. Other than these two statements, Rodriguez has pointed to nothing in the record that even suggests that the district court impermissibly considered either of these factors. Rodriguez attempts to rely on vague inferences that the district court may have considered this evidence. We presume the contrary and therefore hold that there is no evidence to support Rodriguez's claim that he was denied a fair trial.

IV

For the forgoing reasons, we AFFIRM Rodriguez's conviction.

APPENDIX B

§ 851. Proceedings to establish prior convictions

Information filed by United States Attorney

(a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

Affirmation or denial of previous conviction

(b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

Denial; written response; hearing

(c)(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court with a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Imposition of sentence

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

Statute of limitations

(e) No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub. L. 91-513, Title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)